IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

VINCENT KHOURY TYLOR and VINCENT SCOTT TYLOR, Plaintiffs, vs. MARRIOTT INTERNATIONAL, INC., a Delaware Corporation, dba COURTYARD BY MARRIOTT WAIKIKI BEACH and/or COURTYARD WAIKIKI BEACH; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ASSOCIATIONS 1-10, Defendants.	)	CIVIL NO. 14-00069 JMS-RLP (Copyright Infringement) MEMORANDUM IN SUPPORT

MEMORANDUM IN SUPPORT

On September 22, 2014, Defendant MARRIOTT INTERNATIONAL, INC. ("Marriott") filed its motion for partial summary judgment, filed as Doc. #22 in this action ("Marriott's motion"). Hearing on Marriott's motion is set for November 3, 2014, as reflected in the Court's electronic order filed as Doc. #30. Consequently, Plaintiffs' opposition to Marriott's motion must be served and filed no later than October 13, 2014. For the following reasons set forth in this memorandum and in the attached Declaration of Counsel, it is respectfully submitted that Plaintiffs' motion deferring or denying Marriott's Motion for Partial Summary Judgment be granted.

I. RELEVANT FACTUAL BACKGROUND

Marriott's motion was made without the parties having exchanged initial disclosures or either party having completed any discovery.

On February 2, 2014, a Complaint was filed in this an action for preliminary and permanent injunctive relief and damages arising from Marriott's copyright infringements in violation of the United States Copyright Act, 17 U.S.C. §§ 101 et. seq. and the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1202 for Marriott's use of eleven (11) of Plaintiffs' photographic works ("images"), without consent, on Marriott's commercial website and commercial web page on Pinterest.com for its "Courtyard by Marriott Waikiki Beach" property ("Marriott's Pinterest").

From the outset of this case, Plaintiffs' counsel engaged Marriott in settlement discussions to avoid the time and expense of litigation, and Plaintiffs' counsel invited Marriott to identify any issues as to liability so that they could be addressed. The parties agreed to delay discovery, including initial disclosures, and focus on settlement until and unless issues as to liability impeded settlement. Marriott requested that Plaintiffs defer adding its franchisee to the action while settlement negotiations continued, although Marriott contended that the franchisee is the real party in interest. Plaintiffs sent Marriott a settlement demand on April 21, 2014; however, Marriott never responded to that initial demand. Declaration of Counsel at ¶¶ 3-6.

It was not until a July 17, 2014, settlement meeting among counsel that Marriott informed Plaintiffs' counsel that it did not have a response to Plaintiffs' April 21 settlement demand because it believed that it was not liable for any of the claims at issue concerning its infringing activity on Marriott's Pinterest page. In light of the months of delay without any meaningful progress toward settlement, Plaintiffs sent a second settlement demand letter on July 28, 2014, which included a request that the parties proceed with discovery. Marriott's franchisee finally responded on August 14, 2014. Id. at ¶ 7.

Following the filing of this lawsuit, Plaintiff Vincent Khoury Tylor discovered additional copyright infringements and DMCA violations by Marriott and its franchisees on other social media commercial web pages on Facebook.com, Pinterest.com, and Twitter.com, for the purposes of social media marketing and advertising, demonstrating a pattern and practice of willful infringements by Marriott.

On September 20, 2014, Plaintiffs filed a First Motion for Leave to Amend Complaint and Add Parties, Doc. #19, which is pending and seeks to incorporate those recently discovered additional claims and parties. Id. at ¶ 8.

By letter of September 26, 2014, Plaintiffs requested exchange of Rule 26(a) Initial Disclosures no later than October 3, 2014. By email of October 2, 2014, Marriott's counsel responded as follows:

> Thank you for your letter of September 26. We intend to respect the Court's resources and put Marriott's initial disclosures and discovery off until we have a ruling on the motion for partial summary judgment and your motion to amend and add parties. The disclosures and discovery are going to be a waste if the scope of the suit changes due to rulings on the motions.

Id. at ¶ 13.

II. LEGAL STANDARD

Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure on summary judgments:

> "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order."

Fed. R. Civ. P. 56(d). A party requesting a continuance or denial "bears the burden of (1) filing a timely application that specifically identifies relevant information; (2) demonstrating that there is some basis to believe that the information sought exists; and (3) establishing that such information is essential to resist the summary judgment motion." Ill. Nat'l Ins. Co. v. Nordic PCL Constr., Inc., 2013 U.S. Dist.

LEXIS 151748, 39-40 (D. Haw. Oct. 22, 2013) (citing Emp'rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1130 (9th Cir. 2004) (citation omitted).

The Ninth Circuit has held, however, that when a "summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any [Rule 56(d)] motion fairly freely." Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773-74 (9th Cir. 2003); see also Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001) ("Although [Rule 56(d)] facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the non-moving party has not had the opportunity to discover information that is essential to its opposition.'") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, (1986)); see also Wichita Falls Office Assoc. v. Banc One Corp., 978 F.2d 915, 919 n.4 (5th Cir. 1992) ("continuance . . . for purposes of discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence") (internal quotation marks and citations omitted).

Furthermore, where "no discovery whatsoever has taken place, the party making a [Rule 56(d)] motion cannot be expected to frame its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid." Burlington N. Santa Fe R.R., 323 F.3d at 774.

Finally, "[s]ummary denial of a [Rule 56(d) motion] is especially inappropriate where . . . the material sought is also the subject of outstanding discovery requests." VISA Int'l Serv. Ass'n v. Bankcard Holders of Am., 784 F.2d 1472, 1475 (9th Cir. 1986).

III. DISCUSSION

Marriott's motion involves significant public policy considerations for the Court, as Marriott attempts to expand language in the Ninth Circuit's opinion in Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007) to substantially undermine U.S. copyright law by creating an exception to the law for the use of 30 billion "pins" found on Pinterest.com. See Doc. #23-1, Declaration of Yongsheng Wu at ¶ 3. Marriott argues for stripping the billions of images uploaded to Pinterest.com of copyright protections even as to the kind of commercial advertising purposes for which Marriott has used Plaintiffs' images.

There are important differences between Marriott's use of Plaintiffs' images in this case and the role of Google.com as a search engine in Perfect 10. These differences in context only accentuate Marriott's liability here. Plaintiffs believe that the "Pinterest engineering-loophole" exemption urged on this Court in Marriott's motion is irreconcilable with the Supreme Court's recent decision in American Broadcasting Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014). That decision makes clear that the context of infringing use *is* important, particularly where form-over-substance arguments are being made to absolve a business from liability for commercial infringing activity.

Marriott seeks to have the Court address this issue without any context of the social media marketing uses of the images by Marriott. Discovery is necessary in order for the Court to properly consider the context of the business model behind Marriott's infringements in this case. The discovery Plaintiffs seek is expected to show that the context of Marriott's infringements involve a sophisticated and multifaceted on-line marketing program designed to generate online hotel bookings using search engine optimization and international, social media marketing campaigns on Pinterest.com, Facebook.com and Twitter.com, all of which is supported by intensive use of professional images, including Plaintiffs' images, by Marriott to generate positive brand awareness and obtain customers.

Discovery is expected to show that Marriott takes full advantage of social media marketing on Pinterest.com in conjunction with its franchisees, using multiple trade names and brands, creating direct links to Marriott's or franchisee's commercial websites, and using advertised links placed on social media commercial web pages to drive customer traffic to Marriott's commercial websites in order to generate revenue via online hotel bookings at its commercial websites. Discovery is further expected to show that Marriott tracks site views, clicks and online bookings to analyze and the success of its social media marketing efforts. Declaration of Counsel at ¶ 15.

Plaintiffs anticipate that discovery as to Marriott's marketing efforts will show a shift away from legitimate licensing of the use of images in advertisements in favor of social media marketing use of images with willful indifference to copyrights or licenses.

Discovery will further show that Marriott actively selects images it finds on Pinterest.com and uses those images for its own commercial advertising purposes, believing that it can do so without licenses and without risk of copyright infringement. Marriott displayed and contributed to the distribution of copies of its infringing uses of the images at issue, knowing that copyright management information had been removed or altered and in disregard of notice of copyright, by inviting other Pinterest.com users to view and share copies of Marriott's infringing uses on other Pinterest.com user web pages or other social media websites, including Facebook.com or Twitter.com, by clicking on the "Pin it" or "Share" button associated with Marriott's uses.

Discovery on the "re-pin" feature on Pinterest.com - the core issue of Marriott's motion - is also necessary. Marriott's motion relies on a declaration of Pinterest Inc. Software Engineer Yongsheng Wu. It was only from the filing of Marriott's motion, however, that Plaintiffs learned of Mr. Wu in this case. Further inquiry into the statements made by Mr. Wu is necessary to fully understand the "re-pin" feature on Pinterest.com and whether a "re-pinned" image is actually a free-standing copy, one that continues to exist on Pinterest.com even when the third party's source image from which a re-pin was generated is subsequently deleted. Mr. Wu's declaration discusses how images can be added to Pinterest.com, whether by "pin" or "re-pin;" yet his declaration is silent on what happens to "re-pins" when the source image is deleted or whether the removal of a "re-pin" in a chain of "re-pins" causes all the "re-pins" to be removed automatically. These unanswered questions go to the issue of whether a "re-pin" actually is a stable copy of the image on Pinterest.com. Plaintiffs intend to depose Mr. Wu as to the statements made in his declaration, which is essential to resist Marriott's motion. Id. at ¶ 17.

Plaintiffs are also seeking the necessary discovery to address what Marriott presents to be undisputed fact that Plaintiffs' photographic images were "not uploaded to Pinterest by Courtyard by Marriott Waikiki Beach" and instead were "originally Pinned by users other than Courtyard by Marriott Waikiki

Beach." See Marriott's Concise Statement of Facts in Support of its Motion, Doc. 23, at ¶¶ 25-35. Marriott's motion repeatedly argues that "[Marriott] did not upload any of Plaintiffs' photographs to Pinterest;" that Plaintiffs' photographs "had already been posted on the service by other Pinterest users;" and, that "the hotel was not responsible for putting any of those photographs on Pinterest." See Marriott's Memorandum in Support of Motion, Doc. 22-1 at 7-8. However, Marriott does not provide any actual evidence to support that fact. Discovery on Marriott's connection to those third party users or to the images on those third party user Pinterest.com accounts is relevant to the unsupported factual presentation in Marriott's motion and to determine Marriott's liability with respect to the infringements on those user accounts. Id. at ¶ 18.

Plaintiff's motion, it is respectfully submitted, should be granted based on the Ninth Circuit's rulings in Burlington N. Santa Fe R.R. and VISA Int'l Serv. Ass'n as this case is in its early stage where no discovery has taken place and the material sought is the subject of outstanding discovery requests.

The parties agreed to delay the exchange initial disclosures assuming good faith settlement negotiations to resolve this matter without unnecessary legal expense and delay. Plaintiffs invited early identification of any issues as to liability so that the parties could do any discovery that was necessary to resolve those issues in advance of the early settlement conference requested by the parties at the Rule 16 conference. Plaintiffs provided a written settlement demand together with a detailed statement of Plaintiffs' position on Marriott's liability on April 21, 2014; however, months passed and Plaintiffs never received a response to the settlement demand or a statement of Marriott's position.

Plaintiffs sent a second settlement demand letter on July 28, 2014, for which a response was received on August 14, 2014, from counsel for Marriott's franchisee, not a named party to the case. Plaintiffs were then confronted with Marriott's motion without having received Marriott's initial disclosures or completing any discovery.

Marriott's refusal on October 2, 2014, even to provide the initial disclosures required under Rule 26(a) before Plaintiffs must respond to Marriott's motion suggests that Marriott knows that Marriott's motion cannot survive an examination of the factual context of the infringing activity on Pinterest.com that Marriott asks the court to exempt from copyright law.

Plaintiffs are diligently seeking discovery relevant and necessary to oppose Marriott's motion effectively; the Initial Disclosures and the Rule 34 request for Production of Documents and Things are outstanding. Declaration of Counsel at ¶ 14.

Plaintiffs have attempted to be as specific as possible in identifying the relevant information that Plaintiffs believe exists and is essential to properly address Marriott's motion for partial summary judgment. See Burlington N. Santa Fe R.R., 323 F.3d at 774 (where "no discovery whatsoever has taken place, the party making a [Rule 56(d)] motion cannot be expected to frame its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid.").

Plaintiffs have met their burden in requesting a continuance or denial of Marriott's motion and are diligently pursuing the necessary discovery in this case to address Marriott's motion, as shown in the attached declaration of counsel. See Nordic PCL Constr., Inc., 2013 U.S. Dist. LEXIS 151748 at 39-40; Wornick, 264 F.3d at 846.

IV. CONCLUSION

For these reasons, it is respectfully requested that Plaintiffs' motion deferring or denying Marriott's Motion for Partial Summary Judgment be granted.

DATED: Honolulu, Hawai`i, October 3, 2014.

/s/ J. Stephen Street
J. STEPHEN STREET
PAUL MAKI
DANE ANDERSON
Attorneys for Plaintiffs

VINCENT KHOURY TYLOR and VINCENT SCOTT TYLOR v. MARRIOTT INTERNATIONAL, INC. et al.